(1)

Supreme Court, U.S.
FILED

97 • 578 OCT - 1 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

JENICE TORRES,

Petitioner,

vs.

PISANO, *et al.*,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

PURA DE JESUS-CONIGLIO
1025 Grand Concourse
Bronx, New York 10452
(718) 681-1660

BEN M. ARAI
Counsel of Record
1175 Forest Avenue
Bronx, New York 10456
(718) 378-6527

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

62 pp

QUESTIONS PRESENTED

1. Does a terrified victim of supervisory hostile environment racial and sexual harassment waive her legal protections under Title VII and Title IX against unwelcome and unsolicited pregnancy, racial and sexual harassment because she asked an official of the university to keep the matter confidential, rather than taking immediate action to stop the harassment?

2. May an employer which has actual notice and constructive notice of the existence of a hostile working environment avoid liability under Title VII and Title IX on the grounds that an official of the institution honored the terrified victim's request to keep the matter confidential, rather than taking immediate action to stop the harassment?

3. Whether the following facts provide a defense to employer liability under Title VII and Title IX: (1) the victim did not suffer "any serious physical or psychological harm that would have occurred if the employer did not act forthwith"; (2) the victim's letters to the employer's agent recounted only a few relatively minor incidents of harassment; (3) the victim was the only female employee in the supervisor's office at the Dental Center; and (4) there is no indication in the record that any other employees were being harassed by the supervisor in violation of Title VII?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, New York University was a party before the court of appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE SECOND CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE SUPREME COURT'S RULINGS IN *MERITOR* AND *HARRIS* ON THE APPROPRIATE STANDARDS APPLICABLE TO SUPERVISORY HOSTILE ENVIRONMENT SEXUAL HARASSMENT CASES AND DEEPLY OFFENDS TITLE VII'S BROAD RULE OF WORKPLACE EQUALITY AND ITS GOAL OF RIDDING THE WORKPLACE OF ANY KIND OF UNWELCOME RACIAL AND SEXUAL HARASSMENT 8

II. THE SECOND CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE FIRST CIRCUIT'S RULING IN *UNIVERSITY OF PUERTO RICO* THAT IN A TITLE IX CASE, AN EDUCATIONAL INSTITUTION IS LIABLE UPON FINDING OF HOSTILE ENVIRONMENT SEXUAL HARASSMENT *IF* AN OFFICIAL REPRESENTING THAT INSTITUTION KNEW, OR IN THE EXERCISE OF REASONABLE CARE, SHOULD HAVE KNOWN, OF THE HARASSMENT'S OCCURRENCE, *UNLESS* THAT OFFICIAL CAN SHOW THAT HE OR SHE TOOK APPROPRIATE STEPS TO HALT IT 14

CONCLUSION 18

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959 (8th Cir. 1993) 10, 11, 12, 13, 14

E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) 13

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) ..9, 10

Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982) 12

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 12

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) 9, 15, 16, 19

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) ..... *passim*

Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987) 14

Torres v. Pisano, 116 F.3d 625 (2nd Cir. 1997) 1, 11, 16, 18

STATUTES

20 U.S.C. § 1681(a) 2, 3

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000e-2(a)(1) 2

42 U.S.C. § 2000e(k) 2

REGULATIONS

34 C.F.R. § 106.57(b) 3

PETITION FOR WRIT OF CERTIORARI

Jenice Torres ("Torres") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 3, 1997, in order to resolve the conflict between the Second and First Circuit Courts of Appeal on the standard of liability for an educational institution, where an official representing that institution had notice of the harassment's occurrence, and fails to promptly investigate thoroughly and take appropriate steps to halt it.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Torres v. Pisano*, 116 F.3d 625 (2nd Cir. 1997). It is reprinted in Appendix A hereto ("App. A") at page A-1. The opinion of the district court in *Torres v. New York University*, No. 95 Civ. 4106, is not published, but can be found at 1996 WL 393565 (S.D.N.Y. July 15, 1996).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on June 3, 1997. An application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case was presented to Justice Ginsberg,

who on August 25, 1997, extended the time to and including October 1, 1997. (App. B).

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), of the Civil Rights Act of 1964 provides in relevant part:

> It shall be an unlawful employment practice for an employer – (1) . . . to discharge any individual, or otherwise to discrimininate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Section 701(k) of Title VII, as amended in 1978 by the Pregnancy Discrimination Act ("PDA"), makes it unlawful for an employer to discharge or otherwise discriminate against a woman because she is pregnant. 42 U.S.C. §§ 2000e(k) and 2000e(a) (1982).

Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) provides, in relevant part, as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or

> activity receiving Federal financial assistance. . . .

§ 901(a), 20 U.S.C. § 1681(a).

Regulations promulgated pursuant to Title IX specifically apply its prohibition against gender discrimination to discrimination on the basis of pregnancy, parental status, and marital status. Pursuant to 34 C.F.R. § 106.57(b):

> A recipient shall not discriminate against or exclude from employment any employee . . . or on the basis of pregnancy . . .

STATEMENT OF THE CASE

Jenice Torres ("Torres"), a female employee of Puerto Rican ancestry, brought this action against the New York University ("NYU") Dental Center (the "Dental Center"), Leonard Pisano ("Pisano"), Stephen Heller ("Heller"), and her former supervisor, Eugene Coe ("Coe"), then Manager of NYU Dental Center, alleging that the defendants violated Title VII and Title IX and state statutes by discriminating against her on the basis of her pregnancy, race, sex, and for hostile work environment racial and sexual harassment.

Torres' alleges, *inter alia*, that Coe created a hostile environment at the Dental Center where she was employed from 1990 to 1994 as Coe's Administrative Assistant. Torres was the only female employee of the approximately thirty employees under Coe's supervision at the Dental Center at that time. Torres alleges (and some of her male co-workers corroborate) that during the

course of Torres' employment as Coe's Administrative Assistant, Coe habitually made derogatory remarks about Puerto Ricans, ridiculed her pregnancy, and directed sexually explicit innuendos toward her. Coe habitually referred to her as a "dumb cunt" or "dumb spic" in the office. Torres also alleges that Coe made insulting remarks about the size of her breasts and buttocks; told other employees that he wanted to have sex with her; frequently told her that she "should stay home, go on welfare, and collect food stamps like other Puerto Ricans"; told other employees that when she called in sick she was "probably out sucking cocks to earn extra money"; ridiculed her pregnancy by calling her "beer belly" and asked her if she "knew about birth control"; and allowed a friend of his to tell others that she "gave a blowjob to every man who came into the office," and to throw money on the table and mockingly order her to dance for him on top of the table.

Torres was in great fear of Coe because he boasted of his contacts with individuals who could hurt people who caused him problems.

On or about September 1993, Pisano, the Assistant Director of Maintenance of Academic Facilities at NYU, heard of Coe's abusive conduct from one of Torres' coworkers. Pisano called Torres in to his office to meet with him. At that meeting, Pisano suggested to Torres that she file a written complaint, but he did not do anything about her complaints. When Torres did not give Pisano a written complaint, he reiterated his request in December 1993 or January 1994. Pisano seemed to be concerned about

Torres, but he failed to promptly investigate her complaints or take any remedial action to stop Coe's harassment of Torres.

On February 23, 1994, Torres sent a handwritten letter to Pisano apologizing for not writing sooner. Torres tried to explain that it took all of her courage to write the letter because she was "never so intimidated by anyone" until she started working for Coe. She explained that she had not complained to Coe's supervisors because she knew that they were his friends. Torres expressly requested that Pisano keep the matter confidential until they both speak about the matter again.

Despite seeing how Torres was so fearful and intimidated by Coe, Pisano did not assure her that NYU would protect her from Coe or retaliation. At Pisano's request, Torres sent another letter to Pisano on February 1994 which recounted at least ten specific episodes of harassment, such as Coe's remarking to Torres (whom he knew was an extremely religious married woman and a parent) that "[black] men are known for their big penis [sic] and white men are know[n] to have it small, but it doesn't matter the size it's how you use it." Pisano met with Torres to discuss the situation in March 1994. At that time, Torres repeated her request to keep the scandalous nature of her complaints confidential, but she clearly wanted the unwelcome harassment to stop. Torres cried in front of Pisano because she was so intimidated by Coe and was afraid that she would be fired by Coe once he found out about her complaints to Pisano.

As in September 1993, Pisano failed to promptly investigate Torres' complaints or give her any assurances

that NYU would protect her from Coe's abusive racial and sexual harassment. At no time did Pisano assure Torres that NYU would protect her from retaliation if Coe learned about her harassment claims. Pisano waited for almost one year before he initiated an investigation of Torres' harassment complaints. He did so because Torres had been complaining to her union that NYU was allowing Coe to racially and sexually harass her. Because of pressure from Torres' union, NYU arranged for Torres to be transferred to Pisano's office until something could be done to resolve the harassment issue. Torres received the transfer on July 1994.

On July 1994, Torres had a meeting with Pisano and Heller, who was an Administrative Vice President for Administrative Services of NYU at that time. Torres told Heller about Coe's sexual misconduct, and he told her that Coe's actions were "harassment." Heller referred Torres to a NYU social worker to help her cope with the emotional distress caused by Coe's racial and sexual harassment. Coe was terminated by NYU on September 1994 after Pisano commenced an investigation of Torres' charges about Coe's misconduct in August 1994.

Torres filed a discrimination charge with the Equal Employment Opportunity Commission. In late August 1994, Pisano and Heller contacted Torres to request that she drop the EEOC charge against NYU. Torres was frightened and intimidated by Pisano and Heller because they appeared to be angry with her for filing the EEOC charge. She was afraid that NYU was going to dismiss her because of the EEOC charge.

The district court granted NYU's motion for summary judgment on all counts, concluding that NYU could not be held liable for the supervisor's harassment, that there was no evidence that NYU retaliated against Torres for filing charges against NYU with the Equal Employment Opportunity Commission ("EEOC"), and that Torres' common law negligence claim was barred by New York's worker's compensation statute.

Torres filed her notice of appeal after judgment was formally entered on the docket sheet on July 15, 1996.

The Second Circuit affirmed the district court's grant of summary judgment, stating:

> "Torres has made out a prima facie case. But she has not shown that NYU, through its agent Pisano, acted unreasonably in honoring her request to keep the matter confidential, rather than taking immediate action to stop the harassment. Her hostile work environment claim against NYU must accordingly fail. So too must her claims of retaliation and negligence."

App. A, A-37.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Opinion Directly Conflicts With The Supreme Court's Rulings in *Meritor* and *Harris* On The Appropriate Standards Applicable To Abusive Work Environment Harassment Cases And Offends Title VII's Broad Rule Of Workplace Equality And Its Goal Of Ridding The Workplace Of Any Kind Of Unwelcome Racial And Sexual Harassment

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that an employee may establish a violation of Title VII by proving that the employees' employer engaged in discrimination based on sex, including sexual harassment, which created a hostile or abusive work environment. According to *Meritor*, a plaintiff seeking relief for sexual harassment may proceed under two theories: 1) *quid pro quo* harassment; and 2) hostile work environment. In the instant case, Torres seeks relief for racial and sexual harassment under the abusive or hostile work environment theory. App. 3. Hence, Torres will not address the *quid pro quo* harassment theory applicable to abusive hostile work environment cases.

The *Meritor* Court unanimously and decisively agreed that though Vinson's claims did not fit into the *quid pro quo* mold, her evidence did establish a claim for hostile environment sexual harassment. In *Meritor*, this Court declined to announce a definitive rule on employer liability in hostile work environment cases. *See Meritor*, 477 U.S. at 72. Instead, the Court suggested an application of traditional agency principles in determining when an employer is liable for the acts of its employees. The *Meritor* Court stated that supervisory status would not

automatically result in liability. At the same time, the absence of notice to an employer does not necessarily insulate that employer from liability. The Court also rejected the view that the mere existence of a grievance procedure and policy against discrimination, coupled with the victim's failure to invoke that procedure, must insulate the employer from liability. *Meritor*, 477 U.S. at 72.

Though the plaintiff in *Meritor* sued her employer under Title VII, courts have applied the same analysis to sexual harassment claims under Title IX. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 899 (1988) (holding university on notice of hostile environment sexual harassment perpetrated by its supervisors upon employees is liable under Title IX unless official can show that he investigated and put a stop to the harassment). *Meritor* explicitly dealt only with the standard of liability applicable to hostile environment claims.

Meritor teaches that "hostile environment" harassment occurs when one or more supervisors or co-workers create an atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment for them. *Meritor*, 477 U.S. at 67.

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993), this Court stated: "The fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious cases." The *Harris* Court also stated: "Title VII comes into play before the harassing conduct leads to a nervous breakdown," and noting that the "appalling conduct" alleged in *Meritor*,

and alleged in other cases "merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable." *Harris*, 510 U.S. at 22. The Court reasoned that "so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." *Id.*

In *Harris*, this Court reversed the lower court's decision which held that the work environment was not "intimidating or abusive to [Harris] because the harassing conduct was not so severe as to be expected to seriously affect plaintiff's psychological well-being," and that Harris was not "subjectively offended that she suffered injury." The Court observed that the district court's application of these incorrect standards may well have influenced its ultimate conclusion, especially given that the district court found the case "close."

The Second Circuit's opinion in this case directly conflict with the teachings of *Meritor* and *Harris* because the court failed to make a correct inquiry into the fact that Pisano had a duty to investigate Torres' complaints against her supervisor as soon as he heard about Coe's harassment of her on September 1993. By focusing on Torres' requests to Pisano that he keep the matter confidential rather than taking immediate action to stop the harassment, the court mistakenly treats Torres' request as a waiver of her legal protections against unwelcome racial and sexual harassment. The Second Circuit's view is unsupported in law. If the court intended this as a standard or rationale for a standard, it is clearly in error. *See Burns v. McGregor Electronics Industries, Inc.*, 989 F.2d 959 (8th Cir. 1993). This rationale would allow an

employer on notice of unwelcome racial and sexual harassment to do nothing to stop the harassment in situations where the victim's fear of losing her job prevented her from filing written charges against her harassing supervisor. It should be noted that Torres had several meetings where she verbally complained to Pisano about Coe's sexual misconduct.

Torres' conduct, which the courts below found relevant to bar her action, never constituted consent to Coe's sexual misconduct. On the contrary, Torres suffered such emotional distress as a result of the unwelcome sexual harassment that Coe directed toward her that it was even obvious to Pisano and Heller that Heller referred Torres to a NYU social worker to help her cope with the harassment.

The Second Circuit's opinion in *Torres* truly reflects a misunderstanding of the law surrounding a sexual harassment claim under Title VII and Title IX. Sexual harassment is "[u]nwelcome . . . verbal or physical conduct of a sexual nature . . . " *Burns*, 989 F.2d at 964 n. 5. No female worker should be forced to endure continual verbal abuse. *Id.*, at 966. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." *Meritor*, 477 U.S. at 68.

As made clear in *Meritor*, "voluntariness," even voluntary submission to sexual intercourse, is not a defense to a claim of a hostile environment. *Meritor*, 477 U.S. at 68. The Supreme Court in *Meritor* emphasizes this point by quoting an Eleventh Circuit opinion stating:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is

> every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Meritor, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

While *Meritor* and *Harris* effectuate Title VII's as well as Title IX's broad rule of workplace equality and their goal of ridding the workplace of any kind of unwelcome, sexual harassment, the opinion below erroneously construes Title VII and Title IX to avoid the result intended by these statutes.

The court below did not state that the fact that Torres 12 specifically asked the university official to whom she reported the harassment to keep the matter confidential, rather than taking immediate action to stop the harassment constitutes acquiescence or a waiver of "her legal protections against unwelcome harassment." *See Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983). However, the Second Circuit's ruling is tantamount to a holding that a terrified victim of harassment who makes a request for confidentiality until she gathers the courage to file a harassment complaint against her supervisor must continue to work in the hostile work environment until the day that the employer decides to investigate and take corrective action to stop the harassment. As made clear in *Meritor*, "voluntariness," even voluntary submission to sexual intercourse, is not a defense to a claim of a hostile environment. *Meritor*, 477 U.S. at 68. *Accord Burns v. McGregor*

Electronic Industries, Inc., 989 F.2d 959, 962-966 (8th Cir. 1993) (holding that plaintiff's voluntary use of foul language or sexual innuendo in a consensual setting is not a defense to her claim of a hostile sexual harassment environment at the workplace).

In the instant case, Pisano, the NYU official on notice of the harassment since September 1993, App. 4, when he called Torres in to ask her about Coe's harassment of her at work. Even if Pisano was responding to Torres' written complaints of February 1994, rather than her verbal complaints of September 1993, his decision to investigate Torres' claims of harassment on August 1994, which culminated in the harassing supervisor's termination on September 1, 1994, App. 6, was far too late to immunize NYU from liability under Title VII and/or Title IX. The majority of circuits hold that an employer on notice of harassment must investigate the victim's claims immediately. *See Burns*, 989 F.2d 959 (8th Cir. 1993) (holding that sexual harassment by a co-worker is a violation of Title VII if the employer had notice of the harassment and failed to take immediate and appropriate action); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1515 (9th Cir. 1989) (holding that employer liability for supervisory sexual harassment should be imposed when the employer knew of the harassment and failed to take prompt, effective action to stop it).

As stated above, *Meritor* teaches that the gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome". In the instant case, the Second Circuit focused entirely on facts which are irrelevant to the question of whether the sexual innuendos and insults were "unwelcome". Instead, the lower court

focused on Torres' statements to Pisano and created a defense to supervisory hostile environment racial and sexual harassment which is unsupported in law. The conflict is clear and irreconcilable. Certiorari is, therefore, appropriate. To hold otherwise would be contrary to Title VII's goal of ridding the workplace of any kind of unwelcome sexual harassment. *See Burns*, 989 F.2d at 963.

II. The Second Circuit's Opinion Directly Conflicts With The First Circuit's Ruling In *University of Puerto Rico* That In A Title IX Case, An Educational Institution Is Liable Upon A Finding Of Hostile Environment Sexual Harassment *If* An Official Representing That Institution Knew, Or In The Exercise Of Reasonable Care, Should Have Known, Of The Harassment's Occurrence, *Unless* That Official Can Show That He Or She Took Appropriate Steps To Halt It

The lower court's application of these incorrect standards may well have influenced its ultimate conclusion, especially given that the court found the question whether the employer can be held liable despite the fact that the victim specifically asked the person to whom she reported the harassment to keep the matter confidential, rather than taking immediate action to stop the harassment "by no means an easy one." App. 3.

The reasoning of the Second Circuit creates conflicting results on the standard of liability for supervisory hostile environment harassment cases. In taking remedial action, NYU was obliged to promptly investigate Torres' charges and to present a reasonable basis for its subsequent actions. *See Swentek v. USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987).

In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), the plaintiff, a female participant in a medical school surgical residency program alleged, *inter alia*, that she was subjected to sexual harassment by the chief resident and other male superiors while she was in residency training at the university. The First Circuit found it significant that the Supreme Court in *Meritor* defined the parameters of liability for hostile environment harassment by holding that an employer could be liable even when the employee fails to notify the employer of his or her complaint, and even when the employee fails to invoke an existing grievance procedure to protest the alleged harassment. Applying these principles to the case at bar, the court held that the university would be held liable for supervisorial hostile environment sexual harassment "if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, *unless* that official can show that he took appropriate steps to halt it." *University of Puerto Rico*, 864 F.2d at 901 & n. 21 (emphasis added).

In *University of Puerto Rico*, the First Circuit held that the evidence was sufficient to infer that the harassment was so severe and pervasive so as to warrant imputing constructive notice to the employer. In any event, there was also evidence in the record that the plaintiff had given actual notice of the harassment to university officials, but they took no steps to investigate the plaintiff's allegations or stop the harassment. Therefore, the court found the grant of summary judgment in favor of defendants was reversed.

University of Puerto Rico presents the better reasoned approach to the standard applicable to supervisory hostile environment racial and sexual harassment cases. The First Circuit's ruling effectuates Title VII's goal of eliminating supervisory hostile work environment racial and sexual harassment. It reaffirms this Court's longstanding decisions which hold that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. Under the First Circuit's ruling in *University of Puerto Rico,* victims of racial and sexual harassment such as Torres could work in an environment free of harassment and obtain the respect for her race and gender which she deserves.

Under the Second Circuit's ruling in *Torres,* a weak victim who is unaware of her rights under Title VII and Title IX will be at the mercy of her employer who may or may not investigate her complaints of racial and sexual harassment or take remedial action despite having actual or constructive knowledge of the harassment. This is because the *Torres* decision misconstrues the teaching of *Meritor* and the standard it set for supervisory hostile environment sexual harassment cases.

Torres, if allowed to stand, will serve to protect employers rather than the victims of racial and sexual harassment because it completely disregards the university's duty to promptly investigate thoroughly harassment in the workplace. They can do this in creative ways. For example, the university could have protected Torres by investigating her harassment charges by making unannounced visits to her office to check the floors or walls for repairs. An excellent time to investigate Torres' claims would have been after Coe returned to his office from his

lunch breaks. Torres told Pisano that Coe habitually returned from his lunch breaks abusive and intoxicated. Coe could have been reprimanded at that time for drinking alcohol.

The Second Circuit also disregarded Pisano's failure to assure Torres that she had nothing to fear because NYU would protect her from Coe or retaliation. This was never done, and that is the reason why Torres was so reluctant to put her complaints into writing. She was afraid that the university would not protect her from Coe.

As stated above, the Second Circuit has erroneously applied a standard to a supervisory hostile environment racial and sexual harassment case which has no support in law. Indeed, the majority of the circuits which have dealt with abusive or hostile work environment sexual harassment cases have applied the principles set forth in *Meritor* and hold that sexual harassment by a supervisor or co-employee is a violation of Title VII if the employer knew or should have known of the harassment and failed to take immediate and appropriate action to stop it. Incidents unrelated to the sexual harassment are viewed as relevant only to determine whether the harassment was "unwelcome." While Pisano eventually investigated Coe's conduct and took remedial action, his duty to remedy the hostile environment racial and sexual harassment, or at a minimum, inquire, was created approximately eleven months earlier when the initial allegations of harassment were reported to him by Torres and a co-employee.

Because the Second Circuit's ruling creates a defense to a claim of a hostile environment, NYU is allowed to

escape liability under a rationale which results in the victimization of a frightened and intimidated victim. Torres was forced to endure continual racial and sexual abuse at the hands of a supervisor who violated her civil rights with impunity and was rewarded with a promotion a few months before he was fired from the university because of his drinking problems. Under the Second Circuit's ruling only strong victims who are cognizant of the standard set forth in *Torres* will be able to obtain the full protections of Title VII and Title IX. For this reason, as well, Torres' petition should be granted.

CONCLUSION

This case presents a question of exceptional importance to victims of supervisory hostile environment racial and sexual harassment – whether a litigant loses her legal protections under Title VII and Title IX because of factual findings which have no relevance to the question whether plaintiff welcomed the racial and sexual harassment from her supervisor. Indeed, the record in this case shows that Torres never welcomed the harassment from her supervisor.

If the opinion below is allowed to stand, Torres will be treated as if she had acquiesced in the supervisor's sexual harassment and waived her right to work in environment free from racial and sexual harassment and will forever suffer the consequences of a decision that victimizes a terrified victim, and creates a standard or rationale for a standard which is clearly in error because this rationale will only provide a remedy for a strong victim

who will not be afraid to lose her job or fear retaliation. It will also allow an employer on notice of racial or sexual harassment to disregard its duty to promptly investigate a sexual harassment claim on the grounds that institution's official perceived that the victim recounted "only a few relatively minor incidents of harassment." App. 34. This feeble reason for excusing Pisano's failure to investigate Torres' complaints of supervisory harassment on September 1993, App. 4, forced Torres to endure continuous harassment at the hands of Coe for approximately twelve additional months or one year until Pisano decided to investigate and/or take corrective action to end it on August 1994. App. 6.

By granting Torres' petition for certiorari, however, this Court can correct the Second Circuit's erroneous decision, which defies this Court's longstanding view that an employer that forces a female worker to endure or "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor*, 477 U.S. at 67, violates Title VII and/or Title IX. *Accord University of Puerto Rico*, 864 F.2d at 897 (holding an educational institution on notice of supervisory hostile environment sexual harassment when the official representing the university had notice of the harassment and failed to show that he took appropriate steps to halt it). In doing this, this Court can also reaffirm its statement:

> "Title VII affords the employees the right to work in an environment free from discriminatory intimidation, ridicule and insult."

Id., 477 U.S. at 65.

Accordingly, petitioner Jenice Torres respectfully requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

BEN M. ARAI
Counsel of Record
1175 Forest Avenue
Bronx, New York 10456
(718) 378-6527

PURA DE JESUS-CONIGLIO
1025 Grand Concourse
Bronx, New York 10452
(718) 681-1660

Jenice TORRES, Plaintiff-Appellant,

v.

Leonard PISANO, Individually and as Associate Director of Maintenance and Operations of the New York University Dental Center, Defendant-Appellee,

New York University, Stephen Heller, Individually and as Administrative Vice President for Administrative Services of New York University, Defendants-Cross-Claimants-Appellees,

Eugene Coe, Individually and as Facilities Manager of the New York University Dental Center, Defendant-Cross-Claimant-Cross-Defendant-Appellee.

No. 1137, Docket 96-7939.

United States Court of Appeals,
Second Circuit.

Argued March 26, 1997.

Decided June 3, 1997.

Female employee of Puerto Rican background brought suit against university and university officials, alleging sexual and racial harassment, and retaliation in violation of federal and state statutes. Employee also asserted negligence based on failure to supervise alleged harasser and prevent creation of a hostile working environment. The United States District Court for the Southern District of New York, Louis L. Stanton, J., granted summary judgment in favor defendants, and plaintiff appealed. The Court of Appeals, Calabresi, Circuit Judge, held that: (1) plaintiff established prima facie case that

male manager's conduct created a hostile work environment; (2) facilities manager at university's dental center was not at a sufficiently high level in management hierarchy of university for his actions to be imputed automatically to university, for purposes of hostile environment harassment claim; (3) plaintiff failed to establish university's liability on ground that manager used his authority to further the harassment or that he was aided in accomplishing the harassment by existence of agency relationship; (4) knowledge of the harassment could be imputed to university based on knowledge obtained by associate director of maintenance facilities who was harasser's supervisor; (5) associate director did not breach his duty to remedy racial and sexual harassment by honoring employee's request to keep the matter confidential and to refrain from taking action until a later date, precluding university's liability; (6) requests by university officials that employee drop charge of harassment filed with the Equal Employment Opportunity Commission (EEOC) did not constitute "retaliation" under Title VII; and (7) negligence claim was barred by exclusivity provision of state workers' compensation law.

Affirmed.

Ben M. Arai, Bronx, N.Y., for Plaintiff-Appellant.

Terrance J. Nolan, New York City (S. Andrew Schaffer, of counsel), for Defendants-Appellees.

Before: NEWMAN, Chief Judge, CALABRESI, Circuit Judge, and HURLEY,* District Judge.

CALABRESI, Circuit Judge.

This is a case of hostile work environment harassment, in which the plaintiff-employee has established a prima facie case and has demonstrated that the defendant-employer knew of the harassment but did not act to stop it forthwith. In it, we are called upon to determine whether the employer can be held liable despite the fact that the victim specifically asked the person to whom she reported the harassment to keep the matter confidential and to refrain from taking action for the time being. The question is by no means an easy one, and its resolution will necessarily depend on the specific circumstances surrounding the harassment. In the instant case, we conclude that the undisputed evidence establishes that the employer behaved reasonably in honoring the plaintiff's request and in failing to take immediate action. We therefore affirm the district court's grant of summary judgment.

BACKGROUND

Plaintiff Jenice Torres, a Puerto Rican woman, was employed at the New York University ("NYU") Dental Center (the "Dental Center") from 1990 to 1994 as an Administrative Secretary to Eugene Coe, the Dental Center's Facilities Manager. Of the approximately thirty

---

* The Honorable Denis R. Hurley, of the United States District Court for the Eastern District of New York, sitting by designation.

employees under Coe's command at the Dental Center at that time, Torres was the only woman. Torres alleges (and many of her co-workers corroborate) that during the course of Torres' employment, Coe constantly harassed her on the basis or her sex and race. Specifically, Torres claims that Coe: 1) "habitually referred to [Torres] as a 'dumb cunt' or 'dumb spic' in the office"; 2) made insulting remarks about the size of Torres' breasts and buttocks; 3) made sexual innuendos towards Torres; 4) crudely indicated to other employees his desire to have sex with Torres; 5) frequently told Torres that she should stay home, go on welfare, and collect food stamps like the rest of the "spics"; 6) remarked to other people that when Torres called in sick she was "probably out sucking cocks to earn extra money"; 7) ridiculed Torres' pregnancy, calling her "beer belly" and suggesting that she was not smart enough to use birth control; and 8) allowed friends of his who visited him at the office to tell people that Torres "gave a blowjob to every man who came into the office," and to throw money on the table and mockingly order Torres to strip. Coe was apparently in the habit of consuming large amounts of alcohol nearly every day at lunch, which often exacerbated his abusive behavior.

Intimidated by Coe, Torres was afraid to complain to Coe's supervisors. Although she mentioned the matter to coworkers, Torres said nothing to NYU's upper management during the first three years of her employment, and she declined to file a formal harassment charge with NYU or with her union. Finally, in September 1993, Leonard Pisano, the Assistant Director of Maintenance of Academic Facilities at NYU, heard of Coe's abusive conduct from one of Torres' coworkers. Pisano called Torres in to

meet with him. At that meeting, he suggested to Torres that she file a written complaint. When Torres failed to do so, Pisano reiterated that request in December 1993 or January 1994. Around that same time, Pisano was promoted to Associate Director of Academic Facilities, a position that made him Coe's direct supervisor.

On February 23, 1994, Torres put her complaints in writing, in the form of a hand-written letter that she sent to Pisano. In the letter, Torres wrote: "First of all I would like to apologize for not writing sooner as we had originally discussed. It has taken me quite a while to gather courage and strength to begin this letter." She continued: "I have never felt so intimidated by anyone until I started working for Mr. Eugene Coe." She explained that she had not complained to Coe's supervisors because she knew that they were his friends. She "thought there wasn't anyone to turn to until [she] met [Pisano]." In the letter, Torres did not recount many specific allegations of harassment. Instead, she listed the ways in which Coe mistreated numerous employees, and offered a general criticism of Coe as a man and a boss. At the close of the letter, Torres explained that "[t]here is so much more, but it will take some time" to explain. She added, "Len, I hope and ask you to please keep this confidential until we both speak about this matter."

Three days later, at Pisano's request, Torres sent Pisano a second letter. This letter recounted ten episodes of harassment, such as Coe's remarking to Torres (whom he knew was a married, extremely religious woman) that "[b]lack men are known for their big penis [sic] and white men are know[n] to have it small, but it doesn't matter the size it's how you use it." The rest of the letter again

accused Coe of playing favorites among employees and otherwise misusing his authority.

Pisano met with Torres to discuss the situation in March 1994. At that time, Torres again, in her own words, "told him to keep this confidential." Relying on that request, Pisano did nothing until late June 1994, when he called Torres in to meet with Stephen Heller, NYU's Assistant Vice President for Administrative Services. After hearing Torres' story, Heller referred her to a counselor to help her cope with the harassment. Later that month, while Coe was on vacation, Heller and Pisano met with Torres to inform her that she would be receiving a transfer to Pisano's office effective before Coe's return. Torres never worked with Coe again.

Shortly thereafter, Torres filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). In late August 1994, both Pisano and Heller separately asked Torres to drop her EEOC charge. She declined to do so.

In August 1994, Heller confronted Coe about his behavior and commenced an investigation, which culminated in Coe's termination on September 1, 1994. The following month, Torres was transferred, on her own request, to a position as a departmental secretary at the NYU Medical Center. She received a $6,500 raise in her annual salary.

In early March 1995, Torres received a right-to-sue letter from the EEOC. Three months later, she brought this suit against Coe, Pisano, Heller, and NYU, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42

U.S.C. §§ 2000e *et seq.*, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, the New York State Human Rights Law, N.Y.EXEC.LAW §§ 290 *et seq.*, and the New York City Human Rights Law, N.Y.C. ADMIN. CODE §§ 8-101 *et seq.*[1] The complaint also set forth various claims for relief under the common law of torts.

On January 17, 1996, relying on this court's holding in *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir.1995), that, despite the statute's language to the contrary, individuals cannot be held liable under Title VII, Judge Stanton granted summary judgment and judgment on the pleadings dismissing Torres' Title VII and Title IX claims against Pisano, Heller, and Coe in their individual capacities. *See Torres v. New York Univ.*, No. 95 Civ. 4106, 1996 WL 15691 (S.D.N.Y. Jan.17, 1996). Judge Stanton also elected to dismiss the pendant state law claims against the individual defendants.

---

[1] We have repeatedly noted that claims brought under New York State's Human Rights Law are analytically identical to claims brought under Title VII. *See, e.g., Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 714-15 & n. 6 (2d Cir.1996). It has been suggested that "the 'legislative history' of the [New York City Human Rights Law] makes clear that it is to be even more liberally construed than the federal and state anti-discrimination laws." *Burger v. Litton Indus., Inc.*, No. 91-Civ. 0918, 1996 WL 421449, at *19 (S.D.N.Y. Apr.25, 1996), *report adopted*, No. 91 Civ. 0918, 1996 WL 609421 (S.D.N.Y. Oct.22, 1996). It has also been suggested that "[i]n terms of imputing liability to the employer, the [New York State Human Rights Law] imposes a stricter standard than Title VII." *Bush v. Raymond Corp.*, 954 F.Supp. 490, 496 n. 3 (N.D.N.Y.1997). But we need not consider those issues here, as Torres has not challenged the district court's dismissal of her state and city human rights claims on appeal.

Judge Stanton's January 17 ruling left NYU as the only remaining defendant. On July 15, 1996, Judge Stanton granted NYU's motion for summary judgment on all counts, concluding that NYU could not be held liable for Coe's harassment, that there was no evidence that NYU retaliated against Torres for filing charges with the EEOC, and that Torres' common law negligence claim was barred by New York's workers compensation statute. *See Torres v. New York Univ.*, No. 95 Civ. 4106, 1996 WL 393565 (S.D.N.Y. July 15, 1996).

This appeal followed.[2]

DISCUSSION

I

Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We review a grant of summary judgment *de novo*, drawing all factual inferences and resolving all ambiguities in favor of the nonmoving party. *See Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1535 (2d Cir.1997). Applying this standard, we find that NYU cannot be held liable for Coe's harassment, and for that reason we affirm the judgment of the district court.

---

[2] While Torres' notice of appeal initially indicated that she was appealing from both the January 17, 1996 and the July 15, 1996 orders, her brief on appeal challenges only the district court's grant of summary judgment to NYU.

II

Title VII prohibits discrimination on the basis of race and sex with respect to the "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).[3] It is now accepted that this language

---

[3] Title IX provides that "[n]o person in the United States shall, on the basis of sex, . . . be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a). We have held that Title VII principles apply in interpreting Title IX. *See Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248 (2d Cir.1995) ("In reviewing claims of discrimination brought under Title IX by employees, whether for sexual harassment or retaliation, courts have generally adopted the same legal standards that are applied to such claims under Title VII."); *see also Preston v. Com. of Virginia ex rel. New River Community College*, 31 F.3d 203, 207 (4th Cir.1994) ("We agree that Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX."). Accordingly, what is said below with respect to Title VII applies to Torres' Title IX claims as well.

While this court has previously indicated in *dicta* that "Title IX has been construed to prohibit gender discrimination against both students enrolled in federally supported educational programs and employees involved in such programs" and that any "aggrieved individual has an implied right of action for injunctive relief or monetary damages," *Murray*, 57 F.3d at 248 (citation omitted), it should be noted that the only circuit to have decided the question has concluded that an employee of an educational institution has no private right of action for employment discrimination under Title IX. *See Lakoski v. James*, 66 F.3d 751, 754 (5th Cir.1995) ("Given the availability of a private remedy under Title VII for aggrieved employees, we are unwilling to [find] . . . an implied private right of action for damages under Title IX for employment discrimination. Doing so would disrupt a carefully balanced remedial scheme for

"evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment" and to forbid sexual harassment in the workplace. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (internal quotation marks omitted). A plaintiff seeking relief for sexual harassment may proceed under two theories: 1) *quid pro quo* harassment; and 2) hostile work environment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404-05, 91 L.Ed.2d 49 (1986). The same is true for racial harassment. *See Harrison v. Metropolitan Gov't. of Nashville and Davidson County*, 80 F.3d 1107, 1118 (6th Cir.) ("[T]he elements and burden of proof that a Title VII plaintiff must meet are the same for racially charged harassment as for sexually charged harassment."), *cert. denied*, ___ U.S. ___, 117 S.Ct. 169, 136 L.Ed.2d 111 (1996); *cf. Snell v. Suffolk County*, 782 F.2d 1094, 1102-3 (2d Cir.1986) (applying sexual harassment case law in a Title VII racial harassment case). In the instant case, Torres alleges that Coe's conduct created a racially and sexually hostile work environment.

---

redressing employment discrimination by [university] employers. . . . "), *cert. denied*, ___ U.S. ___, 117 S.Ct. 357, 136 L.Ed.2d 249 (1996); *see also Cooper v. Gustavus Adolphus College*, 957 F.Supp. 191, 193 (D.Minn.1997). We need not reach that question here, as we conclude below that, even if she does have a private right of action under Title IX, Torres cannot establish NYU's liability for Coe's harassment.

III

As an initial matter, NYU claims that Torres' allegations of harassment do not, as a matter of law, suffice to establish the existence of a hostile work environment. We emphatically reject this contention.

A hostile work environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris*, 510 U.S. at 21, 114 S.Ct. at 370 (citation and internal quotation marks omitted). Conduct that is "merely offensive" and "not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview." *Id.*

NYU argues that Torres has done no more than allege a handful of incidents of inappropriate behavior that, as a matter of law, were not so pervasive as to meet this objective test. *See Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir.1992) ("The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief."); *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577 (2d Cir.1989) ("The incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive."). While we agree with the principle that isolated,[4] minor episodes of harassment do not merit relief

---

[4] Of course, even a single episode of harassment, if severe enough, can establish a hostile work environment. *See Tomka*, 66 F.3d at 1305 ("[E]ven a single incident of sexual assault

under Title VII, we disagree with its applicability in this case.

In her deposition testimony, Torres alleged that Coe constantly harassed her – so often that she "lost count" – but that she could recall the exact dates and circumstances of only a few incidents of harassment. As such, she may find it difficult to convince a jury that pervasive harassment in fact took place, and that a reasonable employee in her shoes would have found her working environment hostile. But this court cannot say as a matter of law that Coe's alleged conduct did not suffice to create a hostile work environment. If a jury were to credit Torres' general allegations of constant abuse, which were confirmed by her coworkers, it could reasonably find pervasive harassment, even in the absence of specific details about each incident. *See Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1456 (7th Cir.1994) ("[Plaintiff] maintains that she was subjected to almost daily comments, gestures, and innuendo of a sexual nature whenever [the supervisor] was in the office, which by all accounts was at least a majority of the time. Yet because [plaintiff] is unable to recite [the supervisor's] specific comment on each occasion, [the employer] contends that we are limited to the five incidents she has detailed. But we think there is sufficient evidence in the record to corroborate [plaintiff's] charge of ongoing conduct to require a trial on that issue."); *Fernot v. Crafts Inn, Inc.*, 895 F.Supp. 668, 677 (D.Vt.1995) ("The fact that the testimony indicated

---

sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for the purposes of Title VII liability.").

that [the supervisor] was 'always' making sexual remarks and regularly leered at [the plaintiff], rather than giving specific dates, does not negate its role in establishing a work environment of sufficiently pervasive sexual harassment."). *See generally DiLaurenzio v. Atlantic Paratrans, Inc.*, 926 F.Supp. 310, 314 (E.D.N.Y.1996) (noting that the pervasiveness of harassing conduct "is the sort of issue that is often not susceptible of summary resolution").

If the allegations made by Torres are true, she will surely be able to establish that she reasonably found her working environment hostile and abusive. In fact, in light of Coe's repeated statements, which are quoted above, and which are sufficiently offensive that we decline to repeat them here, we find it patently offensive that NYU is willing to concede in its brief only "that several of these incidents as related by plaintiff, if true, were inappropriate, tasteless attempts at humor and conversation, *that could be considered not the best behavior by some people* " (emphasis added).

The fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious of cases. *See Harris*, 510 U.S. at 22, 114 S.Ct. at 370 (stating that "Title VII comes into play before the harassing conduct leads to a nervous breakdown," and noting that the "appalling conduct" alleged in prior cases should not be taken to "mark the boundary of what is actionable"). Harassed employees do not have to be Jackie Robinson, nobly turning the other cheek and remaining unaffected in the face of

constant degradation.[5] They are held only to a standard of reasonableness. Whenever the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse, it is actionable under Title VII, so long as the employee subjectively experienced a hostile work environment. *See id.* at 21, 114 S.Ct. at 370.

A reasonable woman[6] would find her working conditions altered and abusive when her own supervisor

[5] Despite having to endure continuous abuse and racial discrimination upon breaking Major League Baseball's color barrier fifty years ago, Jackie Robinson was able to compile a .297 batting average, lead the league in stolen bases, and earn the Rookie of the Year award. *See* CHARLES C. ALEXANDER, OUR GAME: AN AMERICAN BASEBALL HISTORY 202-03 (1991).

[6] *See Newton v. Department of the Air Force*, 85 F.3d 595, 599 (Fed.Cir.1996) (citing and parenthetically quoting *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir.1991) ("Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment.")); *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir.1995) ("Whether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics."); *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 753 (3d Cir.1995) (noting that the relevant question is whether "the discrimination would have detrimentally affected a reasonable person of the same protected class in that position"); *Dey*, 28 F.3d at 1456 ("[T]he incident on the elevator . . . would no doubt be even more frightening to a reasonable woman in Dey's position who, prior to that incident, had endured more than two years of verbal harassment."); *Burns v. McGregor Electronic Indus., Inc.*, 989 F.2d 959, 962 n. 3 (8th Cir.1993) ("[I]n hostile environment litigation

repeatedly referred to her as a "dumb cunt," suggested that she was in the habit of performing oral sex for

---

under Title VII, the appropriate standard is that of a reasonable woman under similar circumstances."); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir.1987) ("In a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be 'the reasonable woman' since the plaintiff in this type of case is required to be a member of a protected class and is by definition female."); *Carrillo v. Ward*, 770 F.Supp. 815, 822 (S.D.N.Y.1991) (citing *Ellison*, 924 F.2d at 879); *cf. Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1179 (2d Cir.1996) (noting that "the public has frequently been reminded, by courts and commentators, that the subjective sensibilities of an alleged victim may be a relevant consideration in determining whether conduct by a supervisor or a co-worker is legally sanctionable") (citing *Ellison*, 924 F.2d at 878-79). *But see DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir.) ("The test is an objective one, *not* a standard of offense to a 'reasonable woman.' "), *cert. denied*, ___ U.S. ___, 116 S.Ct. 473, 133 L.Ed.2d 403 (1995). The court in *DeAngelis* based its decision – that the objective test does not include consideration of the perspective of a "reasonable woman" – on the Supreme Court's use of the "reasonable person" test in *Harris*. *See DeAngelis*, 51 F.3d at 594. But given that the Supreme Court refused to consider the issue in *Harris*, we do not see how that decision can be taken to have foreclosed the use of a more contextualized objective standard. *See Harris*, 510 U.S. at 22-23, 114 S.Ct. at 370-71 (noting that the Court need not address the EEOC's proposed harassment regulations) (citing 58 Fed.Reg. 51266, 51269 (1993) ("The 'reasonable person' standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability.")); *see also Crowe v. Wiltel Communications Sys.*, 103 F.3d 897, 900 (9th Cir.1996) (explaining that there is no conflict between a standard that takes into account "the perspective of a reasonable person [ ] . . . with the same fundamental characteristics as plaintiff" and the Supreme Court's decision in *Harris*).

money, ridiculed her pregnancy, commented on her anatomy and his desire to have sex with her, and allowed friends of his who visited him at the office to make crude sexual remarks about her.[7] Likewise, a reasonable Puerto

---

In light of *Harris*, several courts have found that a district court does not err in instructing the jury as to a "reasonable person" standard, rather than a "reasonable woman" standard. *See Watkins v. Bowden*, 105 F.3d 1344, 1356 & n. 22 (11th Cir.1997); *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir.1996). We do not consider that issue here. We do note, however, that the Ninth Circuit has found that a district court complies with *Harris* by instructing the jury to use the standard of "a reasonable person[ ] . . . with the same fundamental characteristics as plaintiff." *See Crowe*, 103 F.3d at 900.

[7] It is not only "a woman of Victorian delicacy – a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity," *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir.1995) (Posner, C.J.), who would take substantial offense at Coe's comments. And in any event, judges should be careful to remember that American popular culture can, on occasion, be highly sexist and offensive. What *is*, is not always what is right, and reasonable people can take justifiable offense at comments that the vulgar among us, even if they are a majority, would consider acceptable. *See Reed*, 95 F.3d at 1179 ("It cannot be denied that we live in a time of significant cultural change, in which varieties of coarse conduct once taken for granted in the American workplace appear to be subject to punishment under the law."); *King v. Hillen*, 21 F.3d 1572, 1582 (Fed.Cir.1994) ("[N]o principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside of the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment."); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir.1990)

Rican would find a workplace in which her boss repeatedly called her a "dumb spic" and told her that she should stay home, go on welfare, and collect food stamps like the rest of the "spics" to be hostile. Torres has therefore established a strong prima facie case of sexual harassment.

The fact that many of Coe's statements were not made in Torres' presence is, in this case, of no matter; an employee who knows that her boss is saying things of this sort behind her back may reasonably find her working environment hostile. *Cf. Kotcher,* 957 F.2d at 61, 63 (finding that a supervisor who often pretended to masturbate and ejaculate at an employee behind her back had created a hostile work environment); *Black v. Zaring Homes, Inc.,* 104 F.3d 822, 826 (6th Cir.1997) (emphasizing "that sex-based comments need not be directed at a plaintiff in order to constitute conduct violating Title VII"); *Reynolds v. Atlantic City Convention Ctr. Auth.,* Civ. A. No. 88-4232, 1990 WL 267417, at *4 (D.N.J. May 26, 1990) (granting an employer's motion for summary judgment in part because there was no evidence that the plaintiffs knew what was said about them behind their backs), *aff'd,* 925 F.2d 419 (3d Cir.1991).

(" '[W]hile Title VII does not require that an employer fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinion in a way that abuses or offends their co-workers.' ") (quoting *Davis v. Monsanto Chem. Co.,* 858 F.2d 345, 350 (6th Cir.1988)).

IV

Despite the existence of a jury question as to whether Coe's conduct created a hostile work environment, we affirm the district court's conclusion that, as a matter of law, NYU may not be held liable for that conduct.

Whereas liability for *quid pro quo* harassment is always imputed to the employer, a plaintiff seeking to recover from an employer for hostile work environment must demonstrate some specific basis to hold the employer liable for the conduct of its employees. *See Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir.1994). The Supreme Court has declined to announce a definitive rule on employer liability in hostile work environment cases. *See Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408. Instead, the Court has instructed us to look to common law principles of agency. *See id.*

Relying on the imperfect analogy to agency law, and specifically on the Restatement of Agency, courts have had difficulty establishing coherent rules in this area. While cautioning that "[a] rule of employer liability deriving from traditional agency principles cannot be reduced to a universal, pat formula," we have summarized the law in this circuit thusly:

> [A]n employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will

> generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; consequently, . . . the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Kotcher*, 957 F.2d at 63.

Karibian, 14 F.3d at 780 (some citations omitted). We have also noted that "[a]t some point . . . the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company." *Kotcher*, 957 F.2d at 64.

To recap, an employer will be held liable for the harassment perpetrated by one of its supervisors if:

> a) the supervisor was at a sufficiently high level in the company, or
>
> b) the supervisor used his[8] actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship, or
>
> c) the employer provided no reasonable avenue for complaint, or
>
> d) the employer knew (or should have known)[9] of the harassment but unreasonably failed to stop it.[10]

---

[8] We use the male pronoun since the context of this case, and most harassment cases, is that of a male supervisor and a female victim. We do not doubt that in other contexts, the genders can be different.

[9] An employer can be held liable if it had constructive notice of the harassment, that is, if officials sufficiently high in the management hierarchy should have gained knowledge of it through the exercise of reasonable care. *See, e.g., Murray*, 57 F.3d

A. Sufficiently High Level in the Hierarchy

While it is not clear where the line that we mentioned in *Kotcher* – above which a supervisor is at a sufficiently high level in the management hierarchy of the company for his actions to be imputed automatically to the employer – is to be drawn,[11] we find that Coe's position

---

at 249-50; *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir.1994) ("The proper analysis for employer liability in hostile environment cases is what management-level employees knew or should have known. . . . ").

[10] In a thorough discussion of employer liability under the Restatement of Agency, the Tenth Circuit has recently noted that an employer could also conceivably be held liable for a supervisor's harassment under section 219(1) of the Restatement, which provides that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." RESTATEMENT (SECOND) AGENCY § 219(1) (1958) [hereinafter RESTATEMENT]. As the Tenth Circuit noted, however, liability will rarely attach under this provision because "sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business," *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir.1997) (internal quotation marks omitted). *But see Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 182-84 (6th Cir.1992) (noting that, in the Sixth Circuit, a supervisor who has the authority to hire or fire the victim of harassment acts within the scope of his employment whenever the harassment takes place at the office during working hours and is foreseeable).

[11] It appears that a supervisor may cross that line in two different ways. First, the official may be so high-ranking that the law will consider his acts to be the employer's acts. *See Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir.1986) (explaining that "[s]ince the acts of a corporation are acts of human beings, to say that the 'corporation' has committed some wrong (rather than just that it is liable under the doctrine of respondeat superior for an employee's wrong) simply means

did not cross it. As the highest ranking official at the remote Dental Center, Coe occupied no higher a position in the employer's hierarchy than did the supervisor whose actions we did not impute to the employer in *Kotcher*. *See Kotcher*, 957 F.2d at 64 (noting that the supervisor was the highest ranking company official at the employment site, but did not occupy a position in the upper echelon's of the company's management).[12] As such, Coe was merely a "low-level supervisor" whose actions cannot automatically be imputed to his employer.

---

that someone at the decision-making level in the corporate hierarchy has committed the wrong; the deliberate act of such a person is the corporation's deliberate act."). Second, the official may be so high-ranking that the law will conclusively presume that the employer's upper management had constructive notice of the harassment. *See Kotcher*, 957 F.2d at 64. In the latter situation, the employer will be held liable only if it did not act reasonably to stop the harassment as soon as it had constructive notice. *See infra* Part IV.D.2. It has been suggested that knowledge should be imputed to the employer whenever the harassment was committed by a supervisor. *See, e.g.*, Glen Allen Staszewski, Note, *Using Agency Principles in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 VAND.L.REV. 1057, 1081-82 (1995). But we rejected that position in *Kotcher*.

[12] In fact, *Kotcher* indicates that the fact that the harasser was the highest ranking official at a remote location cuts *against* automatically imputing his actions to the employer, since other members of the corporate hierarchy would be less likely to discover the harassment. *See Kotcher*, 957 F.2d at 64 ("[T]he district court could reasonably have found that the company, whose main office was in Rochester, did not have constructive notice of [the supervisor's] behavior in Oswego.").

B. Use of Authority or the Agency Relationship

Although Coe was Torres's supervisor, there is no evidence that he used his authority to further the harassment or that he was aided in accomplishing the harassment by the existence of the agency relationship. It is true that, "[i]n a sense, a supervisor is always aided in accomplishing the tort by the existence of the agency because his responsibilities provide proximity to, and regular contact with, the victim." *Gary v. Long*, 59 F.3d 1391, 1397 (D.C.Cir.) (internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 116 S.Ct. 569, 133 L.Ed.2d 493 (1995). But that proves too much, as it would allow the exception to swallow the rule. *See id.* It is likewise the case that the supervisor is always aided by the employment relationship because the employee will fear the repercussions that might result from her complaining or resisting. But this exception too, if applied in the absence of specific evidence that the supervisor used his authority to place the employee in a position in which she felt that she could not complain without facing adverse consequences, would swallow the rule and negate our holding in *Kotcher*.[13]

---

[13] *But see* Staszewski, *supra*, at 1094 (arguing that "[i]f the harasser is acting in a supervisory capacity when he creates a hostile work environment, he will necessarily be aided by the agency relation, and liability should properly be imputed to the employer"); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV.L.REV. 1449, 1461 (1984) (using agency principles to argue that "[c]ourts should hold employers liable for all acts of sexual harassment committed by supervisory personnel"). Whatever the merits of the position advocated by these commentators, the Supreme Court has

Thus, in order to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff "must allege facts which establish a nexus between the supervisory authority" and the harassment. *Tomka*, 66 F.3d at 1306. While this is not an onerous requirement, we conclude that Torres has not met it. Cases in which it has been held that the supervisor was aided in the harassment by the existence of the agency relationship have universally involved a more direct use of authority than Torres has pointed to in this case. *See, e.g., id.* at 1306-07 (supervisor convened business dinner and implied that employees were required to attend; supervisor then fostered alcohol consumption at the dinner, which led to sexual assault); *Karibian*, 14 F.3d at 776 (supervisor told plaintiff that she "owed him" for all that he had done for her as her supervisor, and varied "her raises, hours, autonomy and flexibility" according to her responsiveness to his sexual advances); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1352-53 (4th Cir.1995) ("[Plaintiff] specifically testified that [her supervisor] relied upon the authority vested in him by [the employer] to coerce her to comply with his demands. [The supervisor] assertedly told [plaintiff] that if she failed to submit to him she would lose her job, and [plaintiff] testified that she knew that if she had reported [the supervisor's] conduct to anyone she would have been fired."); *DiLaurenzio*, 926 F.Supp. at 315-16 (supervisor ordered employees to call plaintiff at her home to

---

rejected the suggestion that "employers are always automatically liable for sexual harassment by their supervisors." *Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408.

harass her on days when she was sick; supervisor also threatened to retaliate against any employee who complained). The best argument that Torres can muster is that it was only because he was the highest ranking official at the Dental Center that Coe could come to work while intoxicated, and that, in that sense, Coe's position as supervisor facilitated the harassment. This theory is too attenuated to attach liability.[14]

---

[14] The Tenth Circuit has articulated a means by which an employer could be held liable under the first clause of section 219(2)(d) of the Restatement, which provides for liability if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority." RESTATEMENT, *supra*, § 219(2)(d). According to the Tenth Circuit:

> [T]o recover, a plaintiff must show that the employer manifested in the supervisor the authority to act on its behalf, that such manifestation resulted in harm to the plaintiff, and that the plaintiff acted or relied on the apparent authority in some way. The first element is established whenever an employer vests its supervisor with the authority to control significant aspects of the work environment. The second element is satisfied by demonstrating [that] the supervisor subjected plaintiff to sexual harassment. The third element (that plaintiff acted or relied on the apparent authority of her supervisor) is the most difficult to prove and will often hinge upon whether the employer has a formal policy against sexual harassment. When an employer lacks a formal written grievance policy, a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in the harassment or leaving her job. In contrast, if an employer has taken steps to remove any possible inference that a supervisor has authority to sexually harass his subordinates, the victim is likely aware the harassment is not

C. Reasonable Avenue for Complaint

As the district court correctly explained, Torres cannot impute liability to NYU on the ground that it did not provide a reasonable opportunity to complain:

> Torres does not seem to dispute that NYU provided a reasonable avenue for complaint. She knew about NYU's written sexual harassment policy, but did not file a complaint with any of the people designated to receive them. She also knew that the collective bargaining agreement which governed her employment contained an anti-discrimination provision and a grievance mechanism, but she did not file a grievance.

Torres, 1996 WL 393565, at *2.

D. Knowledge and Inaction

The law is clear that "an employer may not stand by and allow an employee to be subjected to a course of racial [and/or sexual] harassment by co-workers" or supervisors. *Snell*, 782 F.2d at 1104 (citation and internal quotation marks omitted). Rather, once an employer has knowledge of the harassment, the law imposes upon the

---

authorized and reliance on apparent authority will be difficult to establish.

Harrison, 112 F.3d at 1444 (citations, brackets, and internal quotation marks omitted); *see also Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 108-110 (3d Cir.1994); *Watts v. New York City Police Dep't*, 724 F.Supp. 99, 106 n. 6 (S.D.N.Y.1989). Liability cannot attach on those grounds in the instant case, however, as it is undisputed that Torres knew of NYU's harassment policy and its availability.

employer a "duty to take reasonable steps to eliminate it." *Id.*

Torres first discussed the harassment with Pisano in September 1993. She sent him two letters on the subject in February 1994. Yet nothing was done about the harassment until late July 1994, when Torres was transferred to another department. In the meantime, Coe continued to harass Torres. It is primarily on this basis that Torres seeks to hold NYU liable.

1) NYU's knowledge

As the district court noted, implicit in Torres' argument that NYU knew of the harassment and did nothing about it is the assertion that Pisano's knowledge of the harassment should be imputed to NYU. Relying on our statement that "[f]or the knowledge of a supervisor to be imputed to the company, that supervisor must be at a sufficiently high level in the hierarchy of the company" that he or she "qualif[ies] as a proxy for the company," *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir.1996), the district court ruled in the instant case that "[t]here is no evidence in the record about Pisano's position in the NYU management hierarchy, an issue on which Torres has the burden of proof," *Torres*, 1996 WL 393565, at * 2, and accordingly held that Pisano's knowledge could not be imputed to NYU. On this point, we disagree with the district court. We believe that there is ample evidence in the record to establish that Pisano's knowledge was attributable to NYU.

An official's actual or constructive knowledge of harassment will be imputed to the employer when principles of agency law so dictate. That will be the case when a) the official is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company, *see Van Zant*, 80 F.3d at 715;[15] or b) the official is charged with a duty to act on the knowledge and stop the harassment, *see* RESTATEMENT (SECOND) AGENCY § 272 cmt. a (1958) [hereinafter RESTATEMENT] ("The liability of a principal because of the knowledge of the agent is based upon the existence of a duty on the part of the agent to act in light of the knowledge which he has."); or c) the official is charged with a duty to inform the company of the harassment, *see id.* at § 275 ("[T]he principal is affected by the knowledge which an agent has a duty to disclose to the principal or to another agent of the principal to the same extent as if the principal had the information.").

We agree with the district court that the record makes it difficult to determine whether Pisano was at a sufficiently high level in NYU's management hierarchy to qualify as a proxy for the employer. But leaving that question aside, we conclude that Pisano's knowledge can

---

[15] *Cf. Hunter*, 797 F.2d at 1422 ("Since the acts of a corporation are acts of human beings, to say that the 'corporation' has committed some wrong (rather than just that it is liable under the doctrine of respondeat superior for an employee's wrong) simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong; the deliberate act of such a person is the corporation's deliberate act."). Likewise, the failure to act on the part of a high-ranking corporate official is the corporation's failure to act.

be imputed to NYU under the rule that, where the person who gained notice of the harassment was the supervisor of the harasser (*e.g.*, had the authority to hire, fire, discipline, or transfer him), knowledge will be imputed to the employer on the ground that the employer vested in the supervisor the authority and the duty to terminate the harassment. *See, e.g., Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015-16 (8th Cir.1988); *Lamb v. Household Credit Servs.*, 956 F.Supp. 1511, 1517 (N.D.Cal.1997); *cf. Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir.1996) (refusing to hold the employer liable in part because the harassed employee did not complain to her supervisor's (the harasser's) supervisor). The record indicates that Pisano was not Coe's supervisor at the time at which he initially learned of, but failed to act on, the harassment. It is undisputed, however, that Pisano did become Coe's supervisor sometime in early 1994, *before* he received Torres' letters of complaint. Accordingly, NYU is responsible for Pisano's failure to act as of the date of his promotion.

Moreover, even before he became Coe's supervisor, Pisano's knowledge could potentially have been imputed to NYU on the ground that Pisano had a duty to inform the company of the harassment:

> Taken as a whole, the cases demonstrate that for purposes of Title VII, "management-level employees" [that is, employees whose knowledge can be imputed to the employer] encompass two groups of persons: first, supervisors possessing substantial authority and discretion to make decisions concerning the terms of the

> harasser's or harassee's[16] employment; and second, non-management employees charged with substantial responsibility for relaying employee complaints to management, particularly where management is located away from the workplace. If a co-worker has knowledge of a harassee's complaint, but that co-worker lacks authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the harassee's employment, the co-worker's inaction does not spark employer liability *unless that co-worker has an official or strong de facto duty to act as a conduit to management for complaints about work conditions.*

Lamb, 956 F.Supp. at 1517 (emphasis added); *see also* RESTATEMENT, *supra*, at § 275.

In the instant case, while Pisano did not have supervisory authority over either Coe or Torres before his promotion in early 1994, the fact that Pisano sought out Torres and approached her about the harassment, seemingly on behalf of NYU, suggests that Pisano was

---

[16] The applicability in this circuit of the rule that the knowledge of a supervisor possessing authority over the terms of the *harassee's* employment will be imputed to the employer is uncertain. We may have suggested in *dicta* in *Van Zant* that an employer is not necessarily liable when the plaintiff informs her immediate (low-level) supervisor of the harassment, and the supervisor fails to act. *See Van Zant*, 80 F.3d at 715-16. It is not, however, clear from the facts of that case whether the plaintiff's immediate supervisor had authority over the terms of her employment. Given the principles of agency law set out above, the correct rule would appear to be that an employer is liable for the knowledge of the harassee's supervisor if that supervisor was empowered (that is, charged with a duty) to protect the harassee from further harm.

"charged with substantial responsibility for relaying employee complaints to management," particularly because here "management [was] located away from the workplace." And even if Pisano was not formally charged with such a duty, Torres may reasonably have believed that he was. According to Torres, Pisano gave her the impression that she could count on him to help her resolve the situation. More importantly, NYU may have structured its management hierarchy in such a way as to suggest to Torres that Pisano was empowered to help her. Pisano himself admitted in deposition testimony that Torres might have felt that he was the correct person with whom to speak "because . . . the situation with our department and how it is structured" could have led her to believe "that th[is] was an avenue to get help." If Torres could show reliance upon a reasonable impression, created by NYU, that Pisano was under a duty to help her, Pisano's knowledge could be imputed to NYU. *See* RESTATEMENT, *supra*, at § 273 ("*Except where there is reliance upon the appearance of agency*, a principal is not bound by knowledge of an agent concerning matters as to which he has only apparent authority.") (emphasis added).

We therefore conclude that, as a matter of law, NYU is responsible for Pisano's knowledge as of the date at which Pisano became Coe's supervisor, and that the record would support a finding that NYU is responsible for Pisano's knowledge even before that date. In other words, NYU knew of the harassment, but did not immediately act to stop it. This does not, however, end our inquiry.

2) NYU's Response

NYU can be held liable only if Pisano did not fulfill his duty to take reasonable steps to remedy the harassment. *See Snell*, 782 F.2d at 1104. The standard is essentially a negligence one, *see* RESTATEMENT, *supra*, § 219(2)(b), "and reasonableness . . . depends among other things on the gravity of the harassment alleged," *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir.1995). On the uncontroverted facts of this case, we conclude that Pisano's failure to act cannot be termed unreasonable.

When Torres first discussed the harassment with Pisano, she asked him not to speak about the matter with anyone. Pisano explained in his deposition:

> Q: Did you investigate at that time?
>
> A: No, I didn't.
>
> Q: Why didn't you?
>
> A: Jenny [Torres] asked me not to do anything. She called me up and told me some things on the phone, and I said[,] ["]well, what do you want to do about it[?"] and she said[,] ["]nothing, I just wanted someone to talk about it,["] and I said[,] ["]you can call me any time you want to, if you need help let me know.["]

Pisano repeatedly suggested to Torres that she should pursue her complaint in writing. But when Torres finally sent a letter to Pisano, she closed with a heartfelt request – "Len, I hope and ask you to keep this confidential until we both speak about this matter" – and thanked Pisano for his "confidentiality" and his time. Torres never followed up that letter by authorizing Pisano to take action, at least not prior to her conversation with Heller,

at which point the harassment was promptly terminated. To the contrary, Torres admits that, in a follow-up conversation with Pisano in March 1994, she again specifically "told him to keep this confidential."

Despite her request for confidentiality, Torres later testified in a deposition that she fully expected Pisano to act to rectify the situation, and that all that she meant in requesting confidentiality was that she did not want Pisano to speak freely about the matter "with people who have no business knowing what is going on." But in evaluating the reasonableness of Pisano's conduct, Torres' understanding is not determinative. What *is* relevant is what Torres said to Pisano, and Pisano's reasonable understanding of what she meant. It is undisputed that Torres, on more than one occasion, asked Pisano to keep the matter "confidential." Pisano explained his understanding of that request when he was asked why he failed to take action:

> A: Because of Jenny. She asked me not to. She asked me again, not to speak to anyone when she had written me those letters in February of [1994]. She specifically wrote in the letters, I'm afraid, please don't say anything to anyone. I felt that I was the only person she had turned to at this point regarding this problem, and to betray her trust in the matter would do harm rather than good.

We therefore have before us a situation in which an intimidated and embarrassed employee was finally able to gather the strength to complain about the harassment that she had been enduring, but specifically asked the supervisor to whom she complained to keep the matter

confidential and to refrain from taking action until a later date. Does a supervisor breach his duty to remedy the harassment by honoring the employee's request? That is not a question that we can answer categorically. Its resolution will vary from case to case.

There is certainly a point at which harassment becomes so severe that a reasonable employer simply cannot stand by, even if requested to do so by a terrified employee. But that is not this case. There are, for example, no allegations here of any serious physical or psychological harm that would have occurred if the employer did not act forthwith. And the law will not presume in every case that harassed members of Title VII's protected classes do not know what is best for themselves and cannot make reasonable decisions to delay – at least for a time – pursuing harassment claims, perhaps for privacy or emotional reasons, until they are ready to do so.

Likewise, there may be cases in which a supervisor or co-worker is harassing a number of employees, and one harassed employee asks the company not to take action. In those cases, the employer's duty to the other employees would take precedence, and the company would most likely not be justified in honoring a single employee's request not to act. But that too is not this case.

What then of this case? By asking Pisano to keep the matter confidential, Torres placed him in a difficult situation. She wrote in her letter: "I thought there wasn't anyone to turn to until I met you. I finally found someone to confide in." Had Pisano ignored her request and pursued a harassment complaint – in the face of Torres' own conscious decision not to do so – he would have breached

her trust. There will be cases in which an employer is forced to do that. But this is not one of them. Torres' letters to Pisano recounted only a few relatively minor incidents of harassment; they did not come close to conveying the full extent of the abuse subsequently alleged in this lawsuit. Moreover, Torres was the only victim of Coe's racial and sexual harassment. She was the only female employee in Coe's office at the Dental Center, and there is no indication in the record that any other employees were being harassed by Coe in violation of Title VII. On these facts, it must be said as a matter of law that Pisano behaved reasonably in honoring Torres' request for confidentiality and in failing to act immediately to end the harassment. Accordingly, while NYU is liable for Pisano's actions, Pisano did not breach his duty to protect Torres from further harassment.

V

On separate occasions in August 1994, Pisano and Heller each asked Torres to drop her EEOC charge. Torres argues that these requests, which she characterizes as demands, constituted retaliation for her having complained about Coe's harassment. We reject this argument.

It is unlawful for an employer to retaliate against an employee for filing a charge pursuant to Title VII. *See* 42 U.S.C. § 2000e-3(a). To establish a prima facie case of unlawful retaliation, a plaintiff must show: "i) participation in a protected activity known to the defendant; ii) an employment action disadvantaging the plaintiff; and iii) a causal connection between the protected activity and the adverse employment action." *Tomka*, 66 F.3d at 1308.

While it is undisputed that Torres' filing of an EEOC charge constituted participation in a protected activity, Torres cannot show that she suffered an adverse employment action. Torres claims that Pisano's and Heller's requests left her feeling "frightened" and "intimidated," but she has not shown, as she must, that she suffered "a materially adverse change in the terms and conditions of employment." *McKenney v. New York City Off-Track Betting Corp.*, 903 F.Supp. 619, 623 (S.D.N.Y.1995).

We have held that "[r]easonable defensive measures do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee and result in differential treatment," so long as they "do not affect the complainant's work, working conditions, or compensation." *United States v. New York City Transit Auth.*, 97 F.3d 672, 677 (2d Cir.1996).

It is conceivable that a demand to withdraw an EEOC charge could constitute retaliation, if it truly had so great an effect on the plaintiff as to alter the conditions of her employment in a material way. For instance, repeated and forceful demands accompanied even by veiled suggestions that failure to comply would lead to termination, discipline, unpleasant assignments or the like, might in some circumstances affect an employee's working conditions. But here Torres admits that Heller and Pisano did not repeat their requests, that she in fact refused their requests, and that she suffered no negative consequences as a result of having turned them down. As such, Torres did not experience an adverse employment action. Indeed, taken as a whole, Pisano's and Heller's reaction to Torres' complaint materially *improved* the conditions of her employment. Torres was transferred at her request

and given a substantial raise. And the man who harassed her was fired.

VI

Torres also alleges that NYU should be held liable under the common law of negligence, based on its failure to supervise Coe and to prevent the establishment of a hostile working environment. As the district court properly found, that claim is barred by New York's Workers' Compensation Law, which provides: "The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ." N.Y.WORK.COMP.LAW § 29(6); *see also Burlew v. American Mut. Ins. Co.*, 63 N.Y.2d 412, 482 N.Y.S.2d 720, 722, 472 N.E.2d 682, 684 (1984) (holding that a claim of negligence against an employer is barred by workers compensation).

Workers' compensation exclusivity does not, however, preclude an employee's suit if the employer committed an intentional tort or another person committed such an intentional wrong at the employer's direction. *See Acevedo v. Consolidated Edison Co.*, 189 A.D.2d 497, 596 N.Y.S.2d 68, 70-71 (1993). But that exception is obviously not applicable to Torres' claim of *negligence*. *See Chrzanowski v. Lichtman*, 884 F.Supp. 751, 756 (W.D.N.Y.1995) ("Plaintiffs argue that their claims fall under the intentional tort or wrong exception. However, the claims at issue are pled in terms of negligence, not intentional wrong. . . . The negligence claims are clearly barred by the exclusivity provision."); *cf. Hart v. Sullivan*,

84 A.D.2d 865, 445 N.Y.S.2d 40, 41 (1981) (analyzing sexual harassment and discrimination in the workplace claims under the workers' compensation statute, and dismissing them because the lack of willfulness on the part of the corporate employer – as opposed to the harassing co-workers – necessitated the conclusion that the complaint against the employer was barred by workers' compensation), *aff'd*, 55 N.Y.2d 1011, 449 N.Y.S.2d 481, 434 N.E.2d 717 (1982).

In disputing this conclusion, Torres cites no cases. She argues instead that workers' compensation exclusivity should not bar Title VII harassment suits. Of course it shouldn't, nor could it under the Supremacy Clause. U.S. CONST. art. VI, cl. 2. But it can and does bar state common law negligence claims.

CONCLUSION

Torres has made out a prima facie case of serious racial and sexual harassment. But she has not shown that NYU, through its agent Pisano, acted unreasonably in honoring her request to keep the matter confidential, rather than taking immediate action to stop the harassment. Her hostile work environment claim against NYU must accordingly fail. So too must her claims of retaliation and negligence.

The district court's grant of summary judgment is therefore affirmed.

(2)

Supreme Court, U.S.
FILED
OCT 24 1997
CLERK

No. 97-578

In The

Supreme Court of the United States

October Term, 1996

JENICE TORRES,

Petitioner,

vs.

LEONARD PISANO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

S. ANDREW SCHAFFER
Counsel of Record
TERRANCE J. NOLAN
Attorneys for Respondents
70 Washington Square South
New York, New York 10012
(212) 998-2257

72283
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

QUESTION PRESENTED

Did the court below correctly affirm the grant of summary judgment to New York University in this hostile environment sexual and national origin harassment case where the petitioner employee several times requested that the matter of which she complained be kept confidential, and where she declined to invoke various University procedures, of which she had knowledge, for making a complaint and when she eventually requested action, the University's response was prompt and effective?

PARTIES TO THE PROCEEDING

The petitioner is Jenice Torres.

The respondents are New York University, Leonard Pisano and Stephen Heller.

The respondent New York University is a not for profit New York education corporation. It has no parent or subsidiary corporations.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	4
Conclusion	7

TABLE OF CITATIONS

Cases Cited:

Coe v. New York University, 10 IER Cases 1246 (BNA) (Sup. Ct. N.Y. Co. 1995) 4

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) ... 4

Lakoski v. James, 66 F.3d 751 (5th Cir. 1995), *cert. denied sub nom, Lakoski v. University of Texas*, __ U.S. __, 117 S. Ct. 357 (1996) 6

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) 5, 6

Lowrey v. Texas A & M University System, 117 F.3d 242 (5th Cir. 1997) 6

Contents

	Page
Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)	4, 5
Torres v. New York University, 1996 U.S. Dist. LEXIS 356	1, 5
Statutes Cited:	
20 U.S.C. § 1681 *et seq.*	1, 5, 6
42 U.S.C. § 2000e *et seq.*	1
42 U.S.C. § 2000e-5(f)(1)	6
Rule Cited:	
Supreme Court Rule 10	5

STATEMENT OF THE CASE

The petitioner seeks this Court's review of the Second Circuit's opinion affirming the grant of summary judgment by the District Court for the Southern District of New York to the respondent New York University[1] ("the University") on claims by the petitioner under Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. § 2000e *et seq.*) ("Title VII"), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*) ("Title IX") and various state law claims. The Second Circuit's opinion is reported at 116 F.3d 625 (2d Cir. 1997). The District Court's opinion is reported at 71 FEP Cases 837 (BNA) and 1996 U.S. Dist. LEXIS 9800.

There is no cause for this Court's review of this fact-specific case where the courts below have correctly applied existing law. Moreover, the petitioner appears indirectly to seek review of a question of law, *i.e.*, the existence of an implied private right of action for employment discrimination under Title IX, a question which neither of the courts below found necessary to reach (App. 9, n. 3).

The petitioner, Jenice Torres, is a current employee of the University. Petitioner was employed from 1990 to 1994 as secretary to Eugene Coe, the building manager of the University's College of Dentistry (App. 3).

According to the petitioner, Coe would come back from lunch under the influence of alcohol and use profanity in the office, including ethnically and sexually derogatory remarks

---

1. The District Court had earlier dismissed the claims against the individuals Leonard Pisano and Stephen Heller. *Torres v. New York University*, 1996 U.S. Dist. LEXIS 356. The petitioner withdrew her appeal from that order before the Second Circuit (App. 8, n. 2).

(App. 4). From 1990 to 1993, the petitioner did not speak to Coe or any supervisor about Coe's behavior.

The petitioner maintained that she did not complain about Coe to any University manager until September 1993, when she was called by Leonard Pisano, the assistant director of maintenance of academic facilities. Pisano was not then Coe's supervisor (App. 4-5). Pisano, concerned about petitioner because of discussions with another employee regarding Coe's conduct, called the meeting to discuss the situation. Pisano, at the meeting, requested that petitioner submit a written complaint. Having received no response from petitioner, sometime in December 1993 or January 1994, Pisano again asked the petitioner for a written complaint. On or about February 23, 1994, five months after originally having been asked to submit a complaint, petitioner submitted a handwritten letter to Pisano regarding Coe (App. 4-5).

In her letter, petitioner made general complaints regarding Coe. Her allegations were in regard to Coe's unfairness to other employees, her unsuccessful request for a salary increase, and she alleged that Coe had said otherwise undescribed "degrading" things to her. Petitioner did not recount many specific allegations of harassment. In closing, petitioner thanked Pisano for his "confidentiality and your time". She did not request that Pisano do anything at that time except keep the matter confidential (App. 5).

Upon Pisano's request for more detail, petitioner submitted a second letter several days later, recounting a number of episodes of verbal harassment (App. 5-6).

In early March 1994, Pisano, who had recently become Coe's supervisor, spoke to the petitioner about her second letter. Pisano was told by the petitioner "not to speak to anyone" and

the petitioner told Pisano to keep it confidential. Petitioner did not broach the subject with Pisano again until late June 1994, at a meeting with Pisano and his supervisor, Stephen Heller, the University's Assistant Vice President for Administrative Services. At the meeting, Heller referred petitioner to a counselor at the University (App. 6).

In July 1994, while Coe was on vacation, Heller and Pisano met with petitioner and informed her that she would be transferred as a secretary from Coe's office to Pisano's office before Coe returned from vacation. Shortly thereafter, she filed a charge with the Equal Employment Opportunity Commission ("EEOC"). She never again worked with Coe.

In August 1994, Heller and Pisano, on separate occasions, spoke briefly with petitioner after her transfer to inquire if she would drop the charge filed with the EEOC. They never spoke again about the subject. On August 15, 1994, the petitioner wrote a letter to Heller stating that "your request has been denied". The petitioner did not withdraw the charge and admitted that nothing adverse occurred as a result (App. 34-36). In October 1994, the petitioner was again transferred, per her request, with good recommendations from Pisano, to a position as a departmental secretary at the University's Medical Center. Her salary was increased approximately $6,500 per annum (App. 6).

Petitioner was aware that she was covered by her union's collective bargaining agreement which prohibited employment discrimination and set out a grievance procedure. Also, she was aware of the University's written policy and procedure concerning sexual harassment. The petitioner admitted that she did not file a grievance under the union contract, or with those individuals listed in the University's sexual harassment policy (App. 25).

In August 1994, Heller met with Coe to inform him of petitioner's allegations. Heller told Coe that the matter would be investigated and if there was any veracity to the petitioner's allegations, Coe would face serious disciplinary action. On September 1, 1994, Heller informed Coe that his employment was terminated.[2] (App. 6). The University took prompt and effective action in response to petitioner's complaint (App. 6, 35-6).

REASONS FOR DENYING THE WRIT

1. The Second Circuit's opinion does not in any way conflict with this Court's decisions in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Rather, the court below correctly stated the law as set forth in *Meritor* and *Harris* (App. 10) and applied it in this very fact-specific case, a case where an employee, who had not raised a complaint on her own initiative, is repeatedly asked for a complaint about harassment and where the employee repeatedly asks that no action be taken and that the matter be kept confidential.[3] The Second Circuit noted that, in this

---

2. Coe commenced litigation against the University arising out of his discharge from employment. *See Coe v. New York University*, 10 IER Cases 1246 (BNA) (Sup. Ct. N.Y. Co. 1995).

3. The petitioner mischaracterizes this Court's decision in *Meritor* by stating that this Court "rejected the view that the mere existence of a grievance procedure and policy against discrimination, coupled with the victim's failure to invoke that procedure, must insulate the employer from liability" (petition, p. 9). In *Meritor*, this Court noted that this circumstance was "plainly relevant" but that the grievance procedure at issue did not address sexual harassment and appeared to require the plaintiff-employee to present her grievance to the alleged harasser. 477 U.S. at 72. Here, the University's grievance procedures specifically addressed sexual harassment and provided the names of a number of

(Cont'd)

situation, "the resolution will vary from case to case" (App. 31-33). When the petitioner did seek action, "the harassment was promptly terminated" by the University (App. 32). Under the court below's analysis of the facts of this case, the court found this not to be among the cases, as this Court noted in *Meritor*, where "employers are always automatically liable for sexual harassment by their supervisors". *Meritor*, 477 U.S. at 72. In the Second Circuit, the petitioner argued, contrary to *Meritor*, that employer liability was automatic (appellant's brief to Second Circuit, pp. 10-11). The petition, given its most liberal reading, appears to argue that there were erroneous factual findings or that the correct rule of law was misapplied. Rule 10 of this Court provides that certiorari is "rarely granted" on such a petition and the petition contains no matter justifying any conclusion that such a rarity should be found to exist by the Court in this case.

2. Petitioner argues that the Second Circuit's opinion is in conflict with the First Circuit's opinion in *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). *Lipsett* was not cited by the petitioner in her brief to the Second Circuit. There is no conflict. Both *Lipsett* and *Torres* correctly recite the rule of law regarding notice to an employer of the existence of sexual harassment. *Lipsett*, 864 F.2d at 901 and *Torres* at App. 19-20. On the specific facts of *this* case, the Second Circuit, applying the rule, correctly found the employer's response reasonable (App. 31-34).

The petitioner, who argues this point under Title IX, apparently assumes, without argument, that Title IX creates an implied private right of action for employment discrimination

---

(Cont'd)
individuals to whom complaints could be made (App. 25). This is the "substantially stronger" case for the employer to which this Court referred in *Meritor*, 477 U.S. at 73.

against an educational institution. In *Lipsett*, the petitioner, a medical resident, "was both an employee *and* a student" 864 F.2d at 897 (emphasis in original). The issue of the applicability of Title IX apparently was not raised. As pointed out by the respondents and as noted by the Court below, it is not established that Title IX creates such a private right of action (App. 9-10, n. 3). The only circuit squarely to have addressed the issue has held that there is no private right of action for sex discrimination in employment by an employee of an educational institution under Title IX. *Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995), *cert. denied sub nom*, *Lakoski v. University of Texas*, __ U.S. __, 117 S. Ct. 357 (1996); *Lowrey v. Texas A & M University System*, 117 F.3d 242 (5th Cir. 1997).[4] The petitioner, in effect, seeks a writ of certiorari on a question not directly addressed in the petition or by the courts below and on which only one circuit has ruled in a case recently denied certiorari by this Court.

---

4. Petitioner may have taken this approach because the respondents raised the issue in the court below (which question was not reached) that the petitioner did not commence this action under Title VII within 90 days of her receipt of a "right to sue" notice from the Equal Employment Commission, as required. 42 U.S.C. § 2000e-5(f)(1).

CONCLUSION

As the court below applied established law and no conflict among the circuits is presented, the petition should be denied.

Respectfully submitted,

S. ANDREW SCHAFFER
Counsel of Record
TERRANCE J. NOLAN
Attorneys for Respondents
70 Washington Square South
New York, New York 10012
(212) 998-2257